

APPEAL NO. 010396

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). Following a contested case hearing held on January 29, 2001, the hearing officer determined that the respondent/cross-appellant (claimant) is entitled to supplemental income benefits (SIBs) for the second, third, and fourth quarters and is not entitled to SIBs for the fifth and sixth quarters. The appellant/cross-respondent (carrier) requests review of the second through fourth quarter determinations while the claimant requests review of the determinations for the fifth and sixth quarters. The claimant filed a combined appeal and response to the carrier's appeal. The file does not contain a response from the carrier.

DECISION

Affirmed.

The parties submitted their respective cases to the hearing officer on stipulated facts, documentary evidence, and argument. They stipulated that the claimant sustained a compensable injury on _____; that her impairment rating (IR) from the compensable injury is 24%; that she did not elect to commute any portion of her impairment income benefits; that the qualifying periods for the five quarters at issue began on June 2, 1999, and continued through August 20, 2000; that the claimant did not look for work each week of these qualifying periods; that the claimant underwent cervical spine surgery on June 16, 1998; that the cervical spine surgery was not approved by a two-to-one decision under the Texas Workers' Compensation Commission's (Commission) spinal surgery second opinion process; that the claimant underwent the cervical spine surgery at (hospital) after receiving the Commission's two-to-one decision against the surgery; that in the cervical spine surgery, bone was harvested from the claimant's left hip iliac crest; that four days after the surgery, the iliac crest graft site fractured and as a result of this fracture the claimant developed heterotopic ossification; that as a result of the heterotopic ossification the claimant ambulates mostly by wheelchair when away from her home; that the claimant's cervical condition improved after the surgery; that during the qualifying periods at issue the claimant's cervical spine did not render her unable to work; and that the claimant's treating doctor, Dr. P, has informed the claimant that due to the heterotopic ossification, she is unable to work in any capacity during the qualifying periods for the second through the sixth quarters.

Following the stipulations, the hearing officer set out his findings and conclusions as follows:

FINDINGS OF FACT

1. Claimant's unemployment during the qualifying periods for the 2nd, 3rd, 4th, 5th, and 6th quarters was a direct result of the impairment from the _____ compensable injury.

2. During the qualifying periods for the 2nd, 3rd, and 4th quarters of SIBS, there was a medical narrative showing Claimant's total inability to work and there were no other records showing the Claimant did have an ability to work.
3. During the qualifying periods for the 5th and 6th quarters of SIBS, there was a medical narrative showing Claimant's total inability to work and there were other records showing the Claimant did have the ability to work.
4. Claimant did make a good faith effort to seek employment commensurate with Claimant's ability to work under Rules [sic] 130.102 during the qualifying periods for the 2nd, 3rd, and 4th quarters.
5. Claimant did not make a good faith effort to seek employment commensurate with Claimant's ability to work under Rule 130.102 during the qualifying periods for the 5th and 6th quarters of SIBS.

CONCLUSIONS OF LAW

3. The Claimant is entitled to SIBS for the second, third, and fourth quarters.
4. The Claimant is not entitled to SIBS for the fifth and sixth quarters.

The carrier disputes Findings of Fact Nos.1, 2, and 4 and Conclusions of Law No. 3. The carrier first contends that the claimant is not entitled to SIBs for the second through the sixth quarters because her hip fracture and subsequent treatment were not part of the impairment related to the compensable injury; her use of a wheelchair to ambulate is not related to the cervical surgery; the hearing officer should not have considered any treatment or disability related to this surgery or the hip fracture in the determination of an inability to work; and the carrier should not be penalized when a claimant pursues medical treatment that was denied under the workers' compensation system and incurs subsequent injuries resulting from such treatment. The carrier argues that neither the 1989 Act nor the Commission's rules specifically provide for the payment of SIBs (or temporary income benefits (TIBs)) under this fact situation; that the decision in Texas Workers' Compensation Commission Appeal No. 961840, decided November 4, 1996, that a claimant could have disability (and be paid TIBs) even though such claimant had proceeded with private medical treatment would run afoul of the decision in Rodriguez v. Service Lloyds Insurance Company, 42 Tex. Sup. Ct. J 900 (July 1, 1999) because of the lack of provisions for such in the 1989 Act or Commission rules; that according to 1 ARTHUR LARSON, THE LAW OF WORKMEN'S COMPENSATION §13.24 (1995), pages 3-195, 196, in Colorado an injured worker who seeks medical services outside the provisions of workers' compensation is not

entitled to disability benefits; and that the Commission oversteps its authority in awarding SIBs in this case.

Responding to this contention, the claimant states that she was awarded SIBs for the first quarter because she established under Rule 130.102(d)(4) that she had no ability to work during the qualifying period, and that in affirming the hearing officer's decision, the Appeals Panel in Texas Workers' Compensation Commission Appeal No. 992458, decided December 22, 1999, determined that while the carrier was not liable for the cost of the claimant's cervical spine surgery, the surgery was treatment for her compensable injury and the ensuing complications were a natural result of the surgery. Our decision in Appeal No. 992458 is dispositive of the carrier's contentions concerning its liability for SIBs and the claimant's having undergone surgical treatment outside the Commission's spinal surgery approval process. In that decision we stated that we did not find merit in the carrier's contention and that, absent some provision in Texas law to the contrary, we find no basis to depart from the well-settled principle that an injured employee is not limited to compensation for a specific injury if such injury, or proper or necessary treatment thereof, causes other injuries which render the employee unable to work.

The carrier further contends that even if the claimant's pursuit of cervical surgery after the Commission failed to authorize it does not disqualify her from SIBs, she is not entitled to SIBs for the second through fourth quarters because the March 30, 2000, report of Dr. B is a record which shows that the claimant had an ability to work, notwithstanding that this report was issued subsequent to the second through fourth quarter qualifying periods.

The claimant disputes Findings of Fact Nos. 3 and 5 and Conclusion of Law No. 4. She contends that Dr. B's views on her ability to work do not seem to consider the heterotopic ossification, for which there is no effective treatment, and the claimant's chronic pain behavior. She also points out that Dr. P has not returned her to work.

On May 6, 1999, Dr. B reported to the carrier that the claimant presents in a wheelchair utilizing a cane, has her left arm in a cast, and cannot perform a functional capacity evaluation (FCE); that she underwent the surgery on her own with "a rather disastrous outcome"; that at this time he feels she would be incapable of returning to her usual job duties; and that, given her current status, he would anticipate that she would have great difficulty in traveling to and from work on a reliable basis.

Dr. J, the attending physician at the hospital pain clinic, wrote on June 4, 1999, that the claimant has severe, incapacitating pain at the donor site with inability to walk or bear weight on the left leg and that in his opinion her pain is severe enough to consider her totally disabled at this time.

Dr. P wrote on June 17, 1999, that the claimant is "significantly disabled by these things," apparently referring to her heterotopic ossification, that he feels "it is going to be

permanent,” and that once her fractured left wrist, broken in a fall, heals, it would be worthwhile to repeat the FCE and IR because he feels she is much more impaired than she was two years ago.

In a report of March 30, 2000, to the carrier of his reexamination and FCE, Dr. B indicates that he examined the claimant and reviewed her medical records. He states that a review of her symptoms complex demonstrates marked variances and inconsistencies; that despite saying she was better, she walks with a cane, places herself in a wheelchair, and “is essentially living out a disability perception”; that her use of the cane and wheelchair do not appear to be necessary on a medical basis; that from a functional standpoint, he sees no medical condition which would preclude her from traveling to and from work, from being at work, and from performing appropriate tasks and duties if she wishes to do so.

The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence including the medical evidence (Texas Employers Insurance Association v. Campos, 666 S.W.2d 286 (Tex. App.-Houston [14th Dist.] 1984, no writ)). We are satisfied that the challenged findings are not so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986); In re King’s Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O’Neill
Appeals Judge

CONCUR:

Judy L. S. Barnes
Appeals Judge

Elaine M. Chaney
Appeals Judge